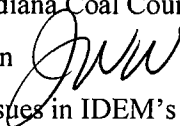


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**Date** September 29, 2008  
**To** Nat Noland, Indiana Coal Council, Inc.  
**From** John W. Watson   
**Re** Due Process Issues in IDEM's proposed Busseron Creek TMDL

### **BACKGROUND**

The Indiana Department of Environmental Management ("IDEM") has proposed total daily maximum loads ("TMDLs") for the Busseron Creek Watershed. Under the federal Clean Water Act, the clear objective of total daily maximum loads ("TMDLs") is to establish stream loadings to address "impairments" that have been identified and prioritized for a particular waterbody. The TMDLs proposed by IDEM include limits for a series of impairments, including impaired biotic communities, total iron, total aluminum, total manganese, total phosphorous, dissolved oxygen, pH, and total suspended solids. None of these constituents were identified as causes of impairment pursuant to section 303(d) of the federal Clean Water Act for the particular water body segments with which they are now linked. As discussed in a separate set of comments prepared by the Indiana Coal Council, IDEM's inclusion of these unlisted impairments lacks a sound technical basis. By proposing limits for unlisted impairments, IDEM's TMDL development also lacks legal basis and constitutes a fundamental violation of the Clean Water Act. Specifically, IDEM has circumvented the 303(d) listing process and has failed to provide the public with its vital opportunity to review and comment on the unlisted impairments. Furthermore, IDEM's proposed TMDLs would, in effect, amend federal law without proper approval from the U.S. Environmental Protection Agency ("EPA"). Given the absence of any technical basis for the

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proposed TMDLs and IDEM's utter disregard for the Clean Water Act's clear TMDL decision-making process, the TMDLs for the unlisted impairments must be stricken.

### **ANALYSIS**

**A. No Basis Exists for the TMDLs because IDEM Circumvented the Clean Water Act Process.**

IDEM's proposed TMDLs seek to regulate a host of constituents that have not resulted in identified impairments to the Busseron Creek Watershed. As explained more fully in the technical comments submitted by the Indiana Coal Council, there is no scientific basis for the proposed TMDLs that concern unlisted impairments. Furthermore, because IDEM has circumvented the decision-making obligations that are fundamental to the TMDL process, its proposed TMDLs lack any legal basis, as well. IDEM consequently has exceeded its designated authority in this process and the resulting TMDLs are inconsistent with and a fundamental violation of the Clean Water Act.

Any attempt to propose impairments at this point in the process represents an unauthorized evasion of federal Clean Water Act requirements. Section 303(d) of the Act obligates states to identify those waterbodies that are not meeting the state's water quality standards, identify the constituents responsible for those impairments, prioritize those impaired waters, and then promulgate TMDLs for the identified constituents. 33 U.S.C. § 1313(d). The Clean Water Act thus establishes a clear process that must occur in sequence, which state water quality managers must follow in addressing their impaired waters. These steps are vital to realizing the objective of the Clean Water Act to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). These steps also form the foundation of the Clean Water Act's water quality-based approach

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to pollution control, which “emphasizes the overall quality of water within a water body and provides a mechanism through which the amount of pollution entering a water body is controlled based on the intrinsic conditions of that body of water and the standards set to protect it.” *Water Quality Handbook*, U.S. Environmental Protection Agency, Chpt. 7, available at <http://www.epa.gov/waterscience/standards/handbook/> (2007). IDEM has disregarded this sequence and has developed TMDLs for the Busseron Creek Watershed that are entirely unsubstantiated.

The proposed Busseron Creek TMDLs include parameters for impaired biotic communities, total iron, total aluminum, total manganese, total phosphorous, dissolved oxygen, pH, and total suspended solids. *Busseron Creek Watershed TMDL Development, Revised Public Review Draft*, Indiana Department of Environmental Management (Sept. 3, 2008). None of these constituents were identified as causes of impairment on Indiana’s 303(d) list for the particular water body segments with which they are now linked. Indeed, IDEM admits that the report includes new constituents, noting in the draft TMDL Report that the agency has “re-assess[ed] the causes of impairment appearing on the 2006 Section 303(d) list” and hence “the pollutants for which TMDLs were developed differ from the pollutants appearing on the 2006 Section 303(d) list.” *Id.* at v.

However, IDEM cannot simply explain away this issue in a few introductory sentences. IDEM lacks any authority to conduct this reassessment or develop TMDLs based on unlisted impairments. Section 303(d)(1)(A) of the Clean Water Act requires each state to first identify its impaired waters and then prioritize that list based on the severity of pollution and the particular waterbody’s designated uses. 33 U.S.C. § 1313(d)(1)(A). Only after that

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deliberative process may IDEM develop TMDLs for those identified water segments. The Busseron Creek TMDL process stands in direct opposition to those procedural requirements and has resulted in overreaching TMDLs.

Section 303(d)(1)(C) of the Clean Water Act further provides that each state must establish TMDLs at a level *necessary* to implement *applicable* water quality standards (*i.e.*, those which are not being met by the listed waterbody). 33 U.S.C. § 1313(d)(1)(C). The federal regulations, in turn, provide that each state must establish TMDLs for *all constituents* preventing attainment of water quality standards *as identified* in the 303(d) list. 40 C.F.R. 130.7(c)(ii). This statutory and regulatory language reinforces that states are to prepare their TMDLs in response to those impairments identified on the 303(d) list. This language further emphasizes the link envisioned by Congress and EPA between TMDL parameters and water quality standards. The content of TMDLs is tied to those particular water quality standards for which a waterbody is impaired. In addition, the content is limited by those standards. Neither the Clean Water Act nor its implementing regulations authorize a state to promulgate TMDLs for constituents that have not been identified as an impairment on the 303(d) listing for the waterbody. To do so renders the 303(d) list meaningless.

The sequential process established by the Clean Water Act and the relationship between 303(d) lists and TMDLs have also been emphasized in EPA's publicly-available water quality guidance to state water quality managers on the development of TMDLs. EPA has stated that "[the Clean Water Act's water quality-based] approach *begins* with the determination of waters not meeting (or not expected to meet) water quality standards . . . . An overall plan to manage excess pollutants in each waterbody can *then* be developed."

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*Guidance for Water-Quality Based Decisions: The TMDL Process*, U.S. Environmental Protection Agency, Chpt. 2, available at <http://www.epa.gov/OWOW/tmdl/decisions/> (1991) (emphasis added). “Once the identification and priority ranking of water quality-limited waters are completed, states are to develop TMDLs at a level necessary to achieve the applicable State water quality standards.” *Id.* at Chpt. 1 (emphasis added). Furthermore, EPA has observed that the Clean Water Act’s water-quality based approach to pollution control consists of “stages” and the stage is to make different water quality decisions at each stage. *Water Quality Handbook*, Chpt. 7. According to EPA’s *Water Quality Handbook*, states are to identify impaired waters at stage 2 and prioritize those waterbodies at stage 3. *Id.* It is not until stage 4 that a state begins developing TMDLs for those impaired waterbodies. *Id.* Several of EPA’s guidance documents provide flow charts, which graphically illustrate this sequence of events for dealing with water pollution. The 303(d) listing effort always precedes the TMDL development process in these flow charts. *Id.* at Chpt. 7; *Guidance for Water-Quality Based Decisions: The TMDL Process*, Chpt. 2. IDEM has entirely disregarded this procedural sequence mandated for state regulation of water quality.

**B. The TMDLs were Developed in Violation of the Clean Water Act because IDEM failed to Provide Adequate Public Comment.**

In addition to lacking any technical or legal basis, the proposed TMDLs make a mockery of the Clean Water Act’s notice and comment requirements and thus constitute a clear violation of the Act. By identifying impairments at the TMDL stage rather than the 303(d) listing stage, IDEM has denied the public and EPA their required right to review and comment on these impairments. This post hoc identification violates both the federal and

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state public comment requirements. As discussed, IDEM recognizes that it has overstepped its authority with its proposed TMDLs, but tries to characterize its actions as merely a “reassessment.” However, IDEM lacks any authority to unilaterally reassess or add constituents to its 303(d) list; to do so represents a blatant disregard for Clean Water Act process and no amount of wordsmithing can change that. Moreover, the public comments currently being solicited by IDEM on the proposed TMDLs and the subsequent EPA review cannot cure this fundamental procedural deficiency.

First, as previously discussed, the purpose of the TMDL process is to develop specific limits for each impaired waterbody. The time for identifying impairments has since passed; impairments are to be established during the 303(d) listing process and should now be taken as a given. Second, and more importantly, courts have consistently held that an opportunity for public participation after-the-fact rarely satisfies an agency’s notice and comment obligations. *See, e.g., Air Transport Ass’n v. Dep’t of Transp.*, 900 F.2d 369 (D.C. Cir. 1990). Notice and comment must precede agency decision-making to ensure not only that the agency benefits from the expertise and input of commenting parties, but also that the agency maintains a flexible and open-minded attitude towards its own decisions. *Nat’l Tour Brokers Ass’n v. Interstate Commerce Comm’n*, 591 F.2d 896, 902 (D.C. Cir. 1978). Courts have found that an agency is not likely to be receptive to suggested changes once it puts its credibility on the line in the form of final rules. *Id.*; *see also Air Transp. Ass’n*, 900 F.2d at 379. In addition, if post hoc public comments could cure this deficiency, then an agency could “negate at will the Congressional [and EPA] decision that notice and an opportunity for comment must precede promulgation.” *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381

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(3d Cir. 1979). Finally, the approach taken by IDEM in identifying the unlisted impairments and developing the corresponding TMDLs arguably amounts to a constructive amendment of its 303(d) list while evading the public comment and EPA review procedures clearly set out in the federal and state requirements. *See Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1098 (9th Cir. 2007) (emphasizing that “if [agencies were] permitted to adopt . . . interpretations [without providing an opportunity for notice and comment], agencies could constructively amend their regulations while evading their duty to engage in notice and comment”) (quoting *Exportal Ltda. v. U.S.*, 902 F.2d 45, 50-51 (D.C. Cir. 1990)).

The critical role of public participation in the 303(d) listing and TMDL processes is underscored by the criticisms now being provided by the Indiana Coal Council regarding the identification of these unlisted impairments to the Busseron Creek Watershed. The Council has prepared a memorandum on the technical flaws in IDEM’s determination that these constituents amount to impairments. The 303(d) listing step is supposed to precede the development of TMDLs so that the appropriate technical considerations on impairments can be made *before* TMDLs are established. The Clean Water Act and EPA’s water quality regulations mandate this sequence, and public input at each step in the process, to ensure that technical issues are addressed at the appropriate stage. Clearly, IDEM’s proposed TMDLs have suffered from a lack of public participation due to IDEM’s failure to provide for public comment on the unlisted impairments at the stage when impairments for the Busseron Creek Watershed should have been identified, specifically, at the stage prior to TMDL development.

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**C. By Proposing a TMDL For an Impairment Not Identified in the 303(d) Listing For the Busseron Creek Watershed, IDEM Effectively Amended Federal Law Without EPA Approval.**

Finally, it must be noted that section 303(d) lists, while developed by the states and incorporated into state law, are ultimately a creature of federal law because they must be reviewed and approved by EPA before a state may incorporate them into their water quality regulatory scheme. *Ala. Dep't of Env'tl. Mgmt. v. Legal Env'tl. Assistance Found.*, 922 So. 2d 101, 112 (Ala. Civ. App. 2005); *see also* 40 C.F.R. § 130.10(b)(2). By adding unlisted impairments at the TMDL stage, IDEM not only has circumvented a fundamental obligation to submit its complete 303(d) list to EPA for review and comment, the state agency also has overstepped its authority, effectively amending federal law without EPA authorization. Since a section 303(d) list becomes federal law upon EPA approval, it cannot be revised without going through the federally-mandated process of EPA review and approval. *Cf. Safe Air for Everyone*, 488 F.3d at 1096-97 (noting that a State Implementation Plan becomes federal law once EPA approves it and cannot be changed unless and until EPA approves any change). IDEM has failed to put its 303(d) list through the statutorily-required rigors of EPA review.

**CONCLUSION**

Accordingly, for the reasons detailed above, the proposed TMDLs for the unlisted impairments must be deemed invalid. There exists no technical or legal bases for these proposed TMDLs. IDEM has entirely disregarded the Clean Water Act's fundamental decision-making process and denied the public and EPA their obligatory right to participate in that process. IDEM consequently has exceeded its authority in developing its TMDLs and



**Memorandum**

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developed parameters that are entirely inconsistent with and in violation of the Clean Water Act.